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No. 643

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

SAMUEL BAILEY, ET AL.,

v.

JOE T. PATTERSON, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

BRIEF IN SUPPORT OF MOTION OF THE APPELLEE, JOE T. PATTERSON, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, TO DISMISS OR AFFIRM

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I. THE APPEAL SHOULD BE DISMISSED BECAUSE THIS COURT LACKS APPELLATE JURISDICTION UNDER TITLE 28, U. S. C. A., SECTION 1253, OR UNDER ANY OTHER STATUTE.

The sole jurisdictional basis for the appeal by Appellants in this cause is Title 28, U. S. C. A., Section 1253, which provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

It is obvious from a reading of the opinion and order of the court below that said court neither granted nor denied Appellants' motion for interlocutory or perma-

nent injunction, but that, instead, the three-judge court merely remitted the cause to an appropriate state court but retained jurisdiction of this cause. It is difficult to perceive how such an order could constitute either a grant or a denial of a motion for preliminary or permanent injunction.

It is clear beyond doubt that the order entered below was not a "final" order or decree as provided by other Federal jurisdictional statutes.

That the order entered below does not meet the test of finality may be shown by a review of the controlling cases on this subject decided by this court.

A decree is final for the purposes of an appeal to the Federal Supreme Court when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. *Heike* vs. *United States*, 217 U. S. 423, 54 L. Ed. 821.

In order to be reviewable by the United States Supreme Court a judgment or decree must be not only final but complete; that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved. *Arnold* vs. *United States Use of Guimarin and Company*, 263 U. S. 427, 68 L. Ed. 371. *Collins* vs. *Miller*, 352, U. S. 364, 64 L. Ed. 616.

The jurisdiction of the United States Supreme Court cannot be invoked until after a final judgment below and until such a judgment has been rendered, the cause remains in the full judicial control of the court in which it is pending. *New York Elevated R. Co.* vs. *Fifth National Bank*, 118 U. S. 608, 30 L. Ed. 259.

In general, a judgment or decision, in either a criminal or civil case, is final for purposes of appeal only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined. *Parr* vs. *United States*, 351 U. S. 513, 100 L. Ed. 1377.

A case may not be brought to the Federal Supreme Court by an appeal or writ of error in fragments but, to be appealable, the judgment must be not only final, but complete. *Collins* vs. *Miller*, supra, 252 U. S. 364, 64 L. Ed. 616. *Oneida Nav. Corp.* vs. *W. S. Job and Co.*, 252 U. S. 521, 64 L. Ed. 697.

Applying the principles enunciated in the above cited cases decided by this court, it seems clear that the order entered by the court below is not final.

Appellee contends that from the foregoing it is amply certain that this Court only hears appeals from final judgments and that the opinion and order of the Court below in this cause does not meet the test of "finality".

Appellee could use no better language in support of this contention than that employed by Mr. Justice Brennan in his dissenting opinion in the case of *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249, 268, 1 L. Ed. 2d 290, 304, as follows:

> "The polestar of federal appellate procedure has always been 'finality', meaning that appellate review of most interlocutory actions must await final determination of the cause at the trial level. 'Finality as a condition of review is a historic characteristic of federal appellate procedure. It was written into the First Judiciary Act and has been departed from only when observance of it would particularly

defeat the right to any review at all.' *Cobbledick* v. *U. S.*, 309 U. S. 323, 324, 325, 84 L. Ed. 783, 785, 60 S. Ct. 540."

In an attempt to sustain the jurisdiction of this Court in this cause Appellants in this Jurisdictional Statement (pages 3-5) cite the cases of *Bryan* vs. *Austin*, 354 U. S. 933, *NAACP* vs. *Bennett*, 360 U. S. 471, *Government and Civil Employees Org. Com., CIO* vs. *Windsor*, 347 U. S. 901, *Glen Oaks Utilities, Inc.* vs. the *City of Houston*, 280 F. 2d 330, and *Ettelson* vs. *Metropolitan Life Insurance Company*, 317 U. S. 188. It should be pointed out that the jurisdictional statute invoked in the *Glen Oaks Utilities* case, supra, was Title 28, U. S. C. A., Section 1292, and that said Section 1292 provides that the courts of appeals shall have jurisdiction of appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions". The language of Title 28, U. S. C. A., Section 1292, under construction in the *Glen Oaks Utilities* Case, Supra, is thus shown to be far more spacious and far reaching than that of the jurisdictional statute invoked here, and for that reason Appellee says that the *Glen Oaks Utilities* case should not be given weight by this court in deciding the question of its jurisdiction to hear this cause.

Ettelson vs. *Metropolitan Life Insurance Company*, supra, should be disregarded for the same reason.

The question of this court's appellate jurisdiction by virtue of the non-appealability of the abstention order entered by the court below in *Bryan* vs. *Austin*, supra, was not raised by the Appellees in that case in their motion to dismiss or affirm, and we think that that case should not be controlling authority because the question

of lack of jurisdiction was not raised. In passing, it is worthy of note that in the *Bryan* vs. *Austin* case, supra, this court vacated the abstention order entered by the court below only because the statute under attack in that case had been repealed by the South Carolina Legislature during the interval between the rendition of the opinion below and the appeal to this court.

It does not appear that the question of the appealability of the abstention order entered below was raised on appeal to this Court in the cases of *NAACP* v. *Bennett*, supra, 360 U. S. 471, or *Government and Civil Employees Org. Com., CIO* v. *Windsor*, supra, 347 U. S. 901.

II. THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED ON THE GROUNDS THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

A. The Court Below Correctly Applied the Doctrine of Equitable Abstention to This Case.

The doctrine of equitable abstention was first clearly enunciated by this Court in the case of *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 497, 85 L. Ed. 971. In our discussion of this doctrine, it might be well to review the language of Mr. Justice Frankfurter in rendering that opinion, so that more light might be shed on the reasons and principles underlying that decision.

This Court at 312 U. S. 499-501, 85 L. Ed. 974, 975, used the following enlightening language with regard to the question of abstention:

"But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the *Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. *Glenn* v. *Field Packing Co.*, 290 U. S. 177, 78 L ed 252, 54 S Ct 138; *Lee* v. *Bickell*, 292 U. S. 415, 78 L ed 1337, 54 S Ct. 727. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication. • • •

"The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play. • • •

"These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. • • •

"The law of Texas appears to furnish easy and ample means for determining the Commission's authority. Article 6453 of the Texas Civil Statutes gives a review of such an order in the state courts. Or, if there are difficulties in the way of this procedure of which we have not been apprised, the issue of state law may be settled by appropriate action on the part of the State to enforce obedience to the order. *Beal* v. *Missouri P. R. Corp.* 312 U. S. 45, ante, 577, 61 S Ct 418, supra; Tex Civil Stat. Article 6476. In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands."

It is clear that the facts of the case at bar and the law applicable thereto falls within the above quoted language of this Court.

If a Federal Court were to hold the attacked statutes to be unconstitutional, it might well make an adjudication which would be soon displaced by a State court decision. It would also be acting contrary to the admonition that federal courts should avoid needless friction with state policies, and that federal courts should have "scrupulous regard for the rightful independence of the state governments".

It should also be pointed out that Appellants and other members of their purported class have adequate remedies under state law to vindicate whatever constitutional rights they may possess.

Appellee says that each and all of the statutes of the State of Mississippi and the ordinances of the City of

Jackson, Mississippi, under attack in this cause as being unconstitutional are susceptible of being given a construction by the Supreme Court of the State of Mississippi which would render them constitutional. Appellee further says that each and all of said statutes and ordinances are constitutional on their face.

If these statutes can be given an interpretation by the highest court of Mississippi that would render them constitutional, it is clear that the doctrine of abstention should be applied in this case.

Although Appellee contends that the statutes under attack in this cause are susceptible of being construed in such manner by the Mississippi Supreme Court so as to render them constitutional, and further asserts that said statutes and ordinances are constitutional on their face, it should be pointed out that none of these statutes or ordinances have come before the State Supreme Court for construction, and that, it is possible that if any or all of said statutes or ordinances should, in the future, come before that Court for interpretation, some or all of them might be held to be unconstitutional on the grounds of repugnance to the Constitution of the State of Mississippi.

This procedure is clearly the one called for by this Court in the *Pullman* case, supra, and the cases following it. Without doubt, the policy considerations underlying *Pullman* would be far better served by this procedure than the injudicious means urged upon this Court by Appellants. It is obvious that if the State courts are given the opportunity to pass on these statutes and ordinances as a condition precedent to the rendering of these statutes and ordinances unconstitutional by a Federal court that an unnecessary ruling of a Federal court on

a question of Federal constitutional law would be avoided and that the necessity for needless friction with State policies would be obviated. *City of Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U. S. 639, 641, 3 L. Ed. 2d 562, 563-564.

This Court has applied the doctrine of equitable abstention in a line of cases down to the present, one of the outstanding cases being *Harrison v. N.A.A.C.P.* 360 U. S. 167, 3 L. Ed. 2d 1152. In that case the three-judge court below (159 F. Sup. 511, 515) found that the Virginia statutes under attack were passed by the Virginia Legislature "to nullify as far as possible the effect of the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686, 38 A. L. R. 2d 1180 . . . as parts of the general plan of massive resistance of the integration of schools in the state under the Supreme Court decrees".

After setting out this finding of the court below, this Court in the *Harrison* case, supra, said at 360 U. S. 176, 3 L. Ed. 2d 1158:

> "According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question."

Even where this Court sustained the finding of a three-judge court that statutes under attack were enacted to frustrate the holding of this Court in the Brown case, this Court wisely saw fit to apply the abstention doctrine, A fortiori, this Court should reach the same result where no such finding was made by the court be-

low and where there was no proof to support such finding.

Appellants at page 26 of their Jurisdictional Statement attempt to distinguish the case at hand from the *Harrison* case, supra, by asserting that in *Harrison* both this Court and the trial court abstained only after being assured that the criminal laws there involved would not be enforced, and that plaintiffs would not suffer further injury pending clarification of the state law issues. In attempting to thus distinguish the instant case from *Harrison*, supra, Appellants overlook a very important difference between the two cases. In *Harrison*, supra, the threatened criminal prosecutions were under the Virginia statutes assailed as unconstitutional, while in this case the criminal prosecutions proceeding against certain persons on behalf of whom this Court, by order dated December 18, 1961, has expressed serious doubts as to the standing of these Appellants to represent in a "spurious class suit", are under statutes which Appellants at page 25 of their Jurisdictional Statement concede to be constitutional.

This Court is thus faced with the anomaly of these Appellants requesting it to restrain and enjoin the enforcement of criminal statutes which they pointedly concede are not challenged as unconstitutional.

At page 25 of their Jurisdictional Statement, under the section of their argument dealing with the doctrine of equitable abstention the Appellants use the following language:

> "In brief, appellants submit that since there is no claim of the invalidity of the disorderly conduct laws involved here, and no necessity for their construction, the principle of abstention is inapplicable.

> This case involves no 'preliminary guess' as to the meaning of the disorderly conduct laws, but rather, a claim that state officials are arresting people and prosecuting them to enforce segregation. Whether the disorderly conduct law does or does not authorize this conduct of the state officials is not decisive of the claim for relief from segregation enforced by the harassment program of appellees. This conduct is proscribed by the Constitution in either event."

The first two sentences from the above quotation appear to have been used to bolster the argument of Appellants that the doctrine of abstention is not applicable to this case. Then Appellants make the amazing statement that whether these statutes do or do not authorize the conduct of the state officials is not decisive of the claim for relief and that this conduct is proscribed by the Constitution in either event. In other words, Appellants are advancing the novel proposition that a state officer can be enjoined from acting under the authority, and not in excess of the authority, of a valid state statute.

As to the authority for such an assertion, Appellants' failure to cite any statute or case law in its support is far more eloquent than any comment that Appellee might make.

Appellants strongly rely on Judge Rives' language in his dissenting opinion below to the following effect:

> "... the segregation statutes are incapable of a valid construction. No authority whatsoever may be found for the proposition that, where a state statute is clearly and unavoidably unconstitutional on its face, comity requires that state courts be allowed the

privilege of so declaring. Such a rule would be, not abstention, but abdication of our judicial function."

Appellee respectfully disagrees with the language and the conclusions to be drawn therefrom quoted by Appellants from the opinion of Judge Rives. First, as stated above, Appellee says that the statutes attacked as unconstitutional are capable of a valid construction. Appellee further disagrees with the statement that no authority may be found for the proposition that, where a state statute is clearly unconstitutional on its face, comity requires that state courts be allowed the privilege of so declaring. As noted above, the policy considerations underlying the *Pullman* case, supra, dictate that state courts should first pass on state constitutional and statutory questions so as to avoid a needless decision on federal constitutional grounds.

Among the other cases in which this Court has applied the equitable abstention doctrine are: *Watson* v. *Buck*, 313 U. S. 387, 85 L. Ed. 417; *Chicago v. Fieldcrest Dairies*, 316 U. S. 168, 86 L. Ed. 1355; *Government and Civil Employees Org. Com., CIO* v. *Windsor*, 353 U. S. 364, 1 L. Ed. 2d 894; and *Louisiana Power & Light Co. v. Thibadaux*, 360 U. S. 25, 3 L. Ed. 2d 1058.

Appellants cite no cases in which the question of the applicability of doctrine of equitable abstention was raised and in which this doctrine was found to be inapplicable. In *NAACP* v. *Bennett*, supra, 360 U. S. 471, and the *Government & Civic Employees Org. of CIO v. Windsor*, 353 U. S. 364, I L. Ed. 2d 894 relied on by appellants to support the jurisdiction of this Court to entertain this appeal, upon remand to the three-judge court below, each of the three-Judge Courts in those cases

again abstained from ruling on the constitutionality of the state statutes involved and again remitted the matters to the state courts. The opinion of the three-Judge Court abstaining for the second time in the *Bennett* case, supra, is found at 178 F. Supp. 191, and the opinion of the three-judge court again abstaining in *Windsor*, supra, is found at 146 F. Supp. 214.

B. Federal Courts Do Not Have Jurisdiction To Restrain Or Enjoin a State Criminal Prosecution Under a State Statute Or Ordinance Not Alleged Or Shown To Be Facially Unconstitutional.

It should be noted at the outset that Appellants admit the validity and the constitutionality of the Mississippi "breach of the peace" statutes, being Sections 2087.5, 2087.7 and 2089.5 of the Mississippi Code Annotated of 1942. Appellants make this concession of constitutionality of these statutes at Page 25 of their Jurisdictional Statement.

Appellee says that this concession on the part of Appellants completely and totally disposes of the aspect of this appeal dealing with the enjoining of pending criminal prosecutions and future arrests under these "breach of the peace" statutes. It is a well-settled rule of law which has been enunciated in a long line of cases down to the present time that an action to enjoin the enforcement of, or prosecutions under, a state criminal statute not alleged or shown to be facially unconstitutional is a suit against a State, and cannot be maintained under the Eleventh Amendment of the United States Constitution.

In the case of *Harkrader* v. *Wadley*, 172 U. S. 148, 43 L. Ed. 399, this Court dealt with this problem and first stated at 172 U. S. 164, 43 L. Ed. 404:

"In the present case it is not contended that the state statute, under which the County Court of Wythe County was proceeding, was repugnant to the Constitution or any law of the United States, or that the state did not have jurisdiction of the offense charged and of the person of the accused."

This Court then went on to state the following rule of law at 172 U. S. 169, 43 L. Ed. 406 as follows:

"No case can be found where an injunction against a state officer has been upheld where it was considered that such officer was proceeding under a valid state statute. In the present case the Commonwealth Attorney, in the prosecution of an indictment found under a law admittedly valid, represented the State of Virginia, the injunctions were therefore in substance injunctions against the state. In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state."

In 1908 this Court decided the landmark case of *Ex Parte Young*, 209 U. S. 123, 52 L. Ed. 714.

In that case this Court found that the Minnesota Rate Acts under attack were void as being in conflict with the "due process clause" of the Fourteenth Amendment.

In dealing with Young's contention that the injunction issued against him as Attorney General of the State of Minnesota was in essence an injunction against the State itself, the Court held that when a suit was brought against an officer of the State to enjoin him from enforcing an *unconstitutional* state law, that the suit was against the individual who held the State office, and not against the State.

At 209 U. S. 161, 162, 52 L. Ed. 730, this Court went on to say:

> "It is further objected (and the objection really forms part of the contention that the State cannot be sued) that a Court of Equity has no jurisdiction to enjoin criminal proceedings by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged *unconstitutional* statute, which is the subject-matter of inquiry in a suit already pending in a Federal Court, the latter Court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other Courts, until its duty is fully performed." (Emphasis Added)

The *Harkrader* and *Young* cases, supra, have been cited and followed by this Court in a long line of cases up to the present day. Among these cases are *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165, 54 L. Ed. 430; *Tyson & Brother* v. *Banton*, 273 U. S. 418, 71 L. Ed. 418; *Cline* v. *Frink Dairy*, 274 U. S. 445, 71 L. Ed 1146 and *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 82 L. Ed. 268.

C. Federal Courts Are Extremely Reluctant To Enjoin The Enforcement Of State Criminal Statutes Even Where It Is Found That Said Criminal Statutes Violate The Constitution Of The United States.

Even in instances in which State criminal statutes have been found to be facially unconstitutional, the Federal Courts are extremely reluctant to enjoin the enforcement of said statutes.

In the leading case of *Douglas* v. *The City of Jeannette*, 319 U. S. 157, 87 L. Ed. 1324, the Jehovah's Witnesses of Pennsylvania sought to enjoin arrests under a Pennsylvania criminal statute, which this Court had just declared unconstitutional (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 87 L. Ed. 1292).

This Court in that case set out the necessary test warranting federal intervention using the following language (319 U. S. 157, 162-163, 87 L. Ed. 1324, 1329):

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. *Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given —should be withheld if sought on slight or inconsequential grounds.* * * * *It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions.* No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of

constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statutes or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. * * * Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, *are to be supported only on a showing of danger of irreparable injury 'both great and immediate'.*" (Emphasis Added)

This Court then assayed the record to see if the test were met. Here is the finding (319 U. S. 157, 164, 87 L. Ed. 1324, 1330):

"* * * It does appear from the record that petitioners have been threatened with any injury *other than that incidental to every criminal proceeding* brought lawfully and in good faith, or *that a federal court of equity* by withdrawing the determination of guilt from the state courts *could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.*" (Emphasis Added)

The rule announced by this Court in the *Douglas* case, supra, has been followed in many other cases, among which are: *Stefanelli* v. *Minard*, 342 U. S. 117, 96 L. Ed. 138; *Pugach* v. *Dollinger*, 365 U. S. 458, 5 L. Ed. 2d 678;

and *Wilson* v. *Schnettler*, 365 U. S. 381, 5 L. Ed. 2d 620.
Respectfully submitted,

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